IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

BUCKS COUNTY EMPLOYEES RETIREMENT FUND, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. ALLY FINANCIAL INC., *et al.*, Defendants.	Case No. 2:16-cv-14104-GAD-MKM **REPLY IN FURTHER SUPPORT OF PLAINTIFF'S MOTION TO REMAND**

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

A. Defendants Bear the Burden to Establish that Removal Was Proper and All Doubts Must Be Resolved Against Removal 2

B. State Courts Retain Jurisdiction over 1933 Act Class Actions 4

1. Defendants' Alternative History of SLUSA Is Unfounded 4

2. Defendants Ignore SLUSA's Substantive Provisions and Rely on the Definitions Section in a Vaccum 5

C. The Consensus Among Federal District Courts Holds that 1933 Act Claims Must Be Remanded 7

III. CONCLUSION 7

TABLE OF AUTHORITIES

PAGE(S)

CASES

Brierly v. Alusuisse Flexible Packaging, Inc.,
184 F.3d 527 (6th Cir. 1999) 2

Fortunato v. Akebia Therapeutics, Inc.,
183 F. Supp. 3d 326 (D. Mass. 2016)....................3, 5

Gaynor v. Miller,
No. 3:15-CV-545-TAV-CCS,
2016 WL 6078340 (E.D. Tenn. Sept. 8, 2016)....................3

Hooks v. Landmark Indus., Inc.,
797 F.3d 309 (5th Cir. 2015) 7

Iron Workers Mid-S. Pension Fund v. Terraform Glob., Inc.,
No. 15-cv-6328, 2016 WL 827374 (N.D. Cal. Mar. 3, 2016)....................3, 7

Kircher v. Putnam Funds Tr.,
547 U.S. 633 (2006)....................4, 6

Knox v. Agria Corp.,
613 F. Supp. 2d 419 (S.D.N.Y. 2009) 3

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit,
547 U.S. 71 (2006)....................4

Parker v. Nat'l City Corp.,
No. 1:08 NC 70012, 2009 WL 9152972 (N.D. Ohio Feb. 12, 2009)....................3, 4, 5

Rosenberg v. Cliffs Nat. Res., Inc.,
No. 1:14CV1531, 2015 WL 1534033 (N.D. Ohio Mar. 25, 2015) 2, 3, 7

In re Tyco Int'l, Ltd.,
322 F. Supp. 2d 116 (D.N.H. 2004)....................6

In re Waste Mgmt., Inc. Sec. Litig.,
194 F. Supp. 2d 590 (S.D. Tex. 2002)....................4, 6

STATUTES, RULES, AND REGULATIONS

15 U.S.C.
§77p(b) 5
§77p(c) 5
§77v(a) 5, 6

OTHER AUTHORITIES

14C Charles Alan Wright, Arthur Miller & Edward H. Hooper, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION §3739 (4th ed. 2014) 2

David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures; The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 273 (2009).....7

I. INTRODUCTION

This securities class action, exclusively asserting ***federal negligence and strict liability*** securities claims under the Securities Act of 1933 (the "1933 Act"), must be remanded. The 1933 Act expressly provides for state court jurisdiction and bars removal of such actions to federal court. By contrast, Securities Litigation Uniform Standards Act ("SLUSA"), the basis for Defendants' removal, does not concern class actions asserting exclusively 1933 Act claims at all. Rather, it creates a mechanism for the removal of ***state law securities fraud*** claims. The statutes intersect only in that SLUSA allows for removal of actions asserting ***both*** state law claims and 1933 Act claims. Seeking to avoid the obvious conclusion that remand is warranted, Defendants make demonstrably incorrect legal and factual claims:

1. Defendants claim that Plaintiff bears the burden on this motion, but they have no direct on point authority and they ignore the numerous decisions that hold that Defendants have the burden. Defs. Opp. at 8-9;

2. Defendants construct an alternative history for SLUSA, portraying it as a measure designed for all securities class actions to proceed "*only* in federal courts." Defs. Opp. at 1 (emphasis in original). But Defendants' claim is simply not true. SLUSA, by its terms, limits itself to state law claims, not federal claims like those here. As the Supreme Court has discussed, SLUSA was not concerned

with preventing plaintiffs from asserting 1933 Act class actions in state court.

3. Defendants claim that there is an "emerging trend" among district courts to hold that SLUSA allows for removal of 1933 Act cases, when the truth is that since 2009, courts have remanded 1933 Act claims roughly 27 times while denying remand 9 times. *See* Exhibit A. Indeed, remand is so heavily favored, that one court opined that the same arguments advanced by Defendants here, were "foreclosed." *Rosenberg v. Cliffs Nat. Res., Inc.*, No. 1:14CV1531, 2015 WL 1534033, at *2-4 (N.D. Ohio Mar. 25, 2015).

Accordingly, and for the reasons set forth in Plaintiff's opening brief (ECF No. 48), Plaintiff's remand motion should be granted.

II. ARGUMENT

A. Defendants Bear the Burden to Establish that Removal Was Proper and All Doubts Must Be Resolved Against Removal

It is established that Defendants bear the burden of establishing federal jurisdiction to overcome the strong presumption against removal. 14C Charles Alan Wright, Arthur Miller & Edward H. Hooper, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION §3739, at 424 (4th ed. 2014); *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 534 (6th Cir. 1999); ECF No. 48 at 5-6. Notwithstanding this authority, Defendants claim that Plantiff bears the burden because the 1933 Act is a federal statute. Defs. Opp. at 8-9.

However, Defendants fail to acknowledge that in the context of 1933 Act cases, courts regularly hold that the removing party, *i.e.*, Defendants, bear the burden. *See, e.g.*, *Rosenberg*, 2015 WL 1534033, at *1 ("As the removing parties Defendants bears the burden of establishing that removal was proper. Moreover, because removal raises significant federalism concerns, federal courts must strictly construe such jurisdiction.")[1]; *Parker v. Nat'l City Corp.*, No. 1:08 NC 70012, 2009 WL 9152972, at *1 (N.D. Ohio Feb. 12, 2009) (same); *Iron Workers Mid-S. Pension Fund v. Terraform Glob., Inc.*, No. 15-cv-6328, 2016 WL 827374, at *4 (N.D. Cal. Mar. 3, 2016) (same). Even the handful of decisions that deny remand motions agree that the moving party carries the burden. *See*, *e.g.*, *Gaynor v. Miller*, No. 3:15-CV-545-TAV-CCS, 2016 WL 6078340, at *2 (E.D. Tenn. Sept. 8, 2016); *Knox v. Agria Corp.*, 613 F. Supp. 2d 419, 421 (S.D.N.Y. 2009).

Defendants' error is significant because of the strained nature of their statutory interpretation. Viewed in a charitable light, Defendants, at best, point to an ambiguity in the law; but, any ambiguity must be strictly construed in favor of remand. *See Fortunato v. Akebia Therapeutics, Inc.*, 183 F. Supp. 3d 326, 332 (D. Mass. 2016) (holding that both interpretations of the statute had some support, but that remand was required in light of the '"deeply rooted' presumption that state

[1] Unless otherwise indicated, all emphasis is added and internal citations are omitted.

courts enjoy concurrent jurisdiction to adjudicate claims arising under the laws of the United States"); *see also Parker*, 2009 WL 9152972, at *3.

B. State Courts Retain Jurisdiction over 1933 Act Class Actions

1. Defendants' Alternative History of SLUSA Is Unfounded

Defendants wrongly claim that Congress enacted SLUSA to make federal court the exclusive forum for all securities class actions. Defs. Opp. at 1-2, 19-23. That position is untenable. SLUSA was not a blunderbuss act ending all state court securities jurisdiction, but, rather, a targeted measure aimed at securities fraud claims arising under the Securiteis Exchange Act of 1934 (the "1934 Act") that were being repackaged as state law claims. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81-82 (2006). SLUSA arose in the wake of the Private Securities Litigation Reform Act ("PSLRA"), when Congress noted that some plaintiffs were "***bringing class actions under state law***" in state court that were really just repackaged 1934 Act fraud claims. *Id*. at 82. Congress enacted SLUSA to address these specific state law fraud claims. *Id*.; *see also In re Waste Mgmt., Inc. Sec. Litig*., 194 F. Supp. 2d 590, 593, 596 (S.D. Tex. 2002) (holding that the "removal sections under SLUSA are expressly and precisely drawn and limited" and "evidence[] Congress' intent to preempt a specifically defined category of state-law class actions"); *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 637 (2006) (holding that SLUSA provides for the removal of "state-law 'covered' class actions alleging untruth or manipulation").

As this history shows, the rationale for SLUSA has no application to the 1933 Act, since the PSLRA did not disturb the 1933 Act's grant of concurrent jurisdiction to state courts and there was no reason for a plaintiff to repackage a 1933 Act claim into a state law claim. The legislative history confirms that Congress did not seek to end concurrent state court jurisdiction. *Parker*, 2009 WL 9152972, at *8; *Fortunato*, 183 F. Supp. 3d at 332.

2. Defendants Ignore SLUSA's Substantive Provisions and Rely on the Definitions Section in a Vaccum

Defendants' statutory construction argument is flawed and inconsistent with the Supreme Court's direction in *Kircher*. The 1933 Act provides state courts with concurrent jurisdiction over 1933 Act claims and contains an anti-removal bar prohibiting their removal to federal court. 15 U.S.C. §77v(a). Defendants claim that notwithstanding these provisions, Congress divested state courts of jurisdiction over 1933 Act class actions because SLUSA amended §77v(a) to allow removal "as provided in section 77p of this title with respect to covered class actions[.]" *Id.*

The material flaw in Defendants' argument is that "section 77p" refers to SLUSA as a whole, which, by its terms, only provides for the removal of class actions "***based upon the statutory or common law of any State***." 15 U.S.C. §77p(b)-(c). SLUSA says nothing about removing federal claims and as the

Supreme Court has held, SLUSA's removal provision is strictly limited to the claims set forth in §77p(b), *i.e.*, those based upon the '"statuory or common law of any State.'" *Kircher*, 547 U.S. at 636 n.1, 642-44. Thus, the most straightforward way to square the 1933 Act with SLUSA is to hold that SLUSA amended the anti-removal bar to clarify that complaints asserting ***both*** state law and 1933 Act claims may be removed and may not rely on the 1933 Act anti-removal bar. *In re Tyco Int'l, Ltd.*, 322 F. Supp. 2d 116, 120, 120 n.6 (D.N.H. 2004).[2]

There is no basis to ignore the substantive sections of SLUSA and instead read the definitions section in isolation. Indeed, the Supreme Court has rejected such a piece-meal approach to the construction of SLUSA. *See Kircher*, 547 U.S. at 643 (courts "do not read statutes in little bites"). Moreover, that approach makes no sense. The definitions section of SLUSA clarifies the meaning of its substantive provisions, which are limited to the removal of state law class actions. *Id.* at 642-44. The definitions section cannot be construed as a free-standing limitation on state court jurisdiction, especially when there is no indication that such a limitation was intended. *Waste Mgmt.*, 194 F. Supp. 2d at 596 ("Congress could easily have made a statement in SLUSA expressly modifying this provision had it so intended.").

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[2] This interpretation is consisent with the '"arising under this subchapter'" language in §77v(a) because a case with both federal and state claims would be deemed to have arisen under the 1933 Act. *Compare id. with* Defs. Opp. at 15-16.

C. The Consensus Among Federal District Courts Holds that 1933 Act Claims Must Be Remanded

Based on an unpublished 2009 decision, Defendants claim that there is a trend among district courts in their favor. Defs. Opp. at 10-11. Defendants are wrong. Since 2009, decisions in favor of remand have out-paced denials at a 3-1 ratio and many courts have remarked on the consensus in favor of remand. *See, e.g.*, *Rosenberg*, 2015 WL 1534033, at *3; *Iron Workers*, 2016 WL 827374, at *6; Exhibit A. Similarly, 1933 Act class actions are proceeding in state courts across the country. ECF No. 48 at 14 n.5.[3]

III. CONCLUSION

Accordingly, the Court should grant Plaintiff's Motion for Remand.

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FINK + ASSOCIATES LAW

/s/ Darryl Bressack
David H. Fink (P28235)
Darryl Bressack (P67820)
38500 Woodward Ave., Suite 350
Bloomfield Hills, MI 48304
Telephone: 248-971-2500

[3] As Defendants point out, a defendant has sought review by the Supreme Court of a state court trial decision that it had jurisdiction over 1933 Act class actions and the Supreme Court has invited the Solictor General to provide its opinion. Such circumstances lead to Supreme Court review only 34% of the time. David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures; The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 273 (2009). There is no timetable for the Solictor General or Supreme Court to act and there is no reason to delay the Court's decision here. *See Hooks v. Landmark Indus., Inc.*, 797 F.3d 309, 313 n.6 (5th Cir. 2015).

Facsimile: 248-971-2600
Email: dfink@finkandassociateslaw.com
Email: dbressack@finkandassociateslaw.com

Geoffrey M. Johnson
SCOTT+SCOTT,
ATTORNEYS AT LAW, LLP
12434 Cedar Road, Suite 12
Cleveland Heights, OH 44106
Telephone: 216-229-6088
Facsimile: 216-229-6092
Email: gjohnson@scott-scott.com

Donald A. Broggi
Thomas L. Laughlin
SCOTT+SCOTT,
ATTORNEYS AT LAW, LLP
The Helmsley Building
230 Park Avenue, 17th Floor
New York, NY 10169
Telephone: 212-223-6444
Facsimile: 212-223-6334
Email: dbroggi@scott-scott.com
Email: tlaughlin@scott-scott.com

David R. Scott
SCOTT+SCOTT,
ATTORNEYS AT LAW, LLP
156 South Main Street
P.O. Box 192
Colchester, CT 06415
Telephone: 860-537-5537
Facsimile: 860-537-4432
Email: david.scott@scott-scott.com

Attorneys for Plaintiff Bucks County Employees Retirement Fund

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2017, a copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Darryl Bressack
Darryl Bressack (P67820)
38500 Woodward Ave., Suite 350
Bloomfield Hills, MI 48304
Telephone: 248-971-2500
Facsimile: 248-971-2600
Email: dbressack@finkandassociateslaw.com